PETITION FOR WRIT OF CERTIORARI

79

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The
Supreme Court of the United States

Harry Dunleavy,
Petitioner, Pro Se

v.

The State of New Jersey, The New Jersey Division of Civil Rights, The New Jersey Attorney General, The New Jersey Department of Education, and individually against, Rene Rovtar, Lorraine Watson, Susan Paletta, and J. Frank Vespa-Papaleo,
Respondent(s)

On Petition For Writ of Certiorari
To The Third Circuit Court of Appeals

21400 United States Court House
601 Market St., Philadelphia, Pa 19106-1790
Tel: 267 299 4919

Case To Be Reviewed 07-1058

District Court No. 2:06-CV-0554(JAG)

Harry Dunleavy
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Augusta, NJ 07822
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PETITION FOR WRIT OF CERTIORARI

In the instant case(s) referenced *07-1058*, the Third Circuit Court of Appeals and the District Court, *2:056-CV-0554(JAG)* have ruled that the State of New Jersey and its agencies can ignore the Age Discrimination in Employment Act (ADEA), and State, and Federal Education Hiring Laws for teachers and place a young, twenty-four (24) year old individual, who had no credentials to be in a classroom on her own, in a public high school as a Mathematics teacher instead of the sixty year old, certified Petitioner, who had all good evaluations as a Mathematics teacher at high school and college levels.

QUESTIONS PRESENTED

I.

Whether, the Federal No Child Left Behind Act and New Jersey's State Education Hiring Laws mandating the hiring of certified teachers for public schools accepting Federal and State Funds should be upheld or obviated.

II.

Whether, a U.S. Court of Appeals can ignore the U.S Supreme Court Decision in *Smith et al vs. City of Jackson, 03-1160, 2005*, and its own standards for age discrimination set forth in *McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973)*, and sanction the hiring of a twenty-four (24) year old individual, who has no qualifications to be in a classroom on her own, as a Mathematics teacher, over a sixty 60) year

old certified Mathematics teacher with all good evaluations.

III.

Whether, the orders of a District Court and a U.S. Court of Appeals, sanctioning the permanent hiring as a Mathematics teacher of an unlicensed individual in a public high school instead of the qualified Petitioner, have legal significance which transcends the Petitioner and affects the public and the United States Judicial System at large.

IV.

Whether, uniformity should be maintained in the Courts, upholding Federal and State Education Hiring Laws, such as the No Child Left Behind Act (NCLBA) and New Jersey's Education Hiring Laws, which require teachers in public schools accepting Federal and State Funds to be certified.

V.

Whether, The United States Court of Appeals for the Third Circuit can sanction the petitions of the State of New Jersey to ignore Federal and State Education Hiring Laws, which require public school teachers to be certified and sanction the hiring of an unlicensed individual as a mathematics teacher, not qualified to be in a classroom on her own, over a certified Mathematics teacher with all good evaluations.

VI.

Whether, a U.S. Court of Appeals was correct in ordering that the New Jersey Division of Civil

Rights, because it was not a Federal agency, could withhold documentation from the Petitioner notwithstanding the fact that New Jersey itself has a wide-reaching Freedom of Information Act Law referenced C.47:1A-1.

VII.

Whether, the Petitioner should have been accorded due process, which would have allowed him to serve interrogatories and take depositions of the Respondents.

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OPINIONS BELOW

The opinions of the United States District Court for The District of New Jersey and The United States Court of Appeals for The Third Circuit Court cited in this case are enclosed.

STATEMENT OF JURISDICTION

This is a direct request for Certiorari from a judgment of the United States Court of Appeals for the Third Circuit referenced *07-1058*, dated October 16, 2007. The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1)*.

STATUTES INVOLVED

The Age Discrimination in Employment Act (ADEA); The No Child Left Behind Federal Act (NCLBA), which requires public schools accepting Federal Funds to hire certified teachers; The Civil Rights Act § 1983; New Jersey's Education Laws 6A:9-6.3(b), 6A:9-6.5(a), 6A:9-6.5(b), which prohibit hiring unlicensed individuals as teachers when certified ones are available.

STATEMENT OF THE CASE

1. Nature of the Case

This is a request for Certiorari regarding Age discrimination from the Third Circuit Court of Appeals. To a large extent, the U.S. District Court of Appeals has predicated its decision on a previous case referenced *05-3922*. Therefore, an elucidation on that case is of moment in this brief/argument. The Petitioner is not an attorney and will be grateful if the Court will grant him any procedural leeway

established by *Haines V. Kerner, 404 U.S. 519, 30 L.ED.2D 652, 1972.* As a former Board Member, Vice President, and President of a Board of Education in the State of New Jersey, the Petitioner is knowledgeable on education hiring laws in that State and took the required courses regarding same.

2. **Reason for Granting Certiorari**

Conflicts with U.S Court of Appeals and the U.S. Supreme Court in decisions regarding Age Discrimination and conflicts with well established Federal and State Education Hiring Laws. Ironically, the Third Circuit Court of Appeals has previously admitted in Case referenced *05-3922* that certification is required to teach in public high schools. Yet, they have ignored it in the present case.

3. **Facts**

The Petitioner, who is over sixty years of age, is a certified mathematics teacher in the States of New Jersey and New York with all good teaching evaluations at high school and college level. The New Jersey Division of Civil Rights (NJDCR), the Federal District Court in New Jersey, and the United States Court of Appeals for the Third Circuit effectively ruled that a twenty-four year old individual with no qualifications to be in a classroom on her own could be hired instead of this Petitioner. Respondent Rene Rovtar, former Morris County Superintendent of Schools, acted as an agent for Mount Olive High School to evade Federal and State Education Hiring Laws and have young, unlicensed individuals hired instead of the Petitioner. Respondent Lorraine Watson, a regional manager for the New Jersey Division of Civil Rights (NJDCR) lied in her decision by claiming that the New Jersey

Department of Education endorsed the hiring of an unlicensed individual as a mathematics teacher instead of the certified Petitioner. The New Jersey Attorney General and the New Jersey State Education Department ignored the illegal actions. The NJDCR fraudulently withheld documentation to the detriment of the Petitioner for over two years.

ARGUMENT AND REASONS FOR PETITION

1. The legal significance of hiring a twenty-four (24) year old, unlicensed individual as a high school mathematics teacher instead of a licensed, sixty-year (60) old in this case far transcends the interest of the actual Petitioner and affects the public and uniformity in the judicial and educational system as a whole. Were the decisions in this case allowed to stand, the floodgates would be opened and licensing requirements would be obviated for teaching in public schools in New Jersey and the nation as a whole. A dangerous and binding precedent would be established, and any public school district could hire individuals "off the street" as teachers. The blight could then be permeated into other States, trades, or professions, resulting in a state of flux and death of the ADEA.

2. The Federal No Child Left Behind Act (NCLBA) and New Jersey State Education Laws, neither of which are ambiguous, require public school districts that accept Federal Funds to hire certified teachers. The Petitioner is a permanently certified high school mathematics teacher in the States of New Jersey and New York. All of his past evaluations as a high school and college mathematics teacher were good. On June 6, 2002, the Petitioner, who was then sixty-

years old, applied for a position as a Mathematics teacher at Mount Olive High School in New Jersey. He was passed over for a twenty-four year old individual, Ms. Elizabeth Ditchek, who had no certification or qualifications to be in a classroom on her own, had to be shown how to do lesson plans, and who had to be assigned a mentor named Tony Frame. This was a clear violation of New Jersey's Education Laws and the Federal NCLBA. The Petitioner and his elected Representatives brought the above actions, in writing, to the attention of the New Jersey Department of Education and the State Attorney General, but were ignored. The comparisons of the Petitioner's educational qualifications to those of the hired, unlicensed, twenty-four year old individual are of the essence and are set forth below.

Factual Documented History of Qualifications

Certified Teacher in High School Mathematics:

Petitioner, Yes

Hired Unlicensed Individual, No

Certified Teacher in High School Spanish:

Petitioner, Yes

Hired Unlicensed Individual, No

Degree in Mathematics:

Petitioner, Yes

Hired Unlicensed Individual, No

Masters in Mathematics and Education:

Petitioner, Yes

Hired Unlicensed Individual, No

30 Additional Credits beyond Masters:

Petitioner, Yes

Hired Unlicensed Individual, None

Student Teaching:

Petitioner, Yes

Hired Unlicensed Individual, No

Nine Years' Teaching Experience:

Petitioner, Yes

Hired Unlicensed Individual, None

3 Long-term Substitute Teaching Positions:

Petitioner, Yes

Hired Unlicensed Individual, No

3 Years' College Teaching Experience:

Petitioner, Yes

Hired Unlicensed Individual, None

All Good High School Teaching Evaluations:

Petitioner, Yes

Hired Unlicensed Individual, None

Excellent Math. College Teaching Record:

Petitioner, Yes

Hired Unlicensed Individual, None

Heathkit Cert. Digital Electronic Systems:

Petitioner, Yes

Hired Unlicensed Individual, No

Radio Electronics Officers Certificate:

Petitioner, Yes

Hired Unlicensed Individual, None

1st Class Radiotelegraph Certificate:

Petitioner, Yes

Hired Unlicensed Individual, None

U.S. Coast Guard Marine Officer's License:

Petitioner, Yes

Hired Unlicensed Individual, None

School Board Vice President and President:

Petitioner, Yes

Hired Unlicensed Individual, No

3. On September 27, 2002, the petitioner filed a complaint referenced *EP27AE-48689* with the New Jersey Division of Civil Rights (NJDCR) citing age discrimination. The complaint was dismissed on October 24, 2003, falsely stating that the New Jersey Department of Education had endorsed the actions of the High School in hiring an individual with no qualifications to be in a classroom on her own. The NJDCR ignored Petitioner's request to turn over the alleged information from the New Jersey Department of Education. No such information existed and the New Jersey Department of Education was never contacted by the Division of Civil Rights. New Jersey State Senator Raymond Lesniak brought this to the attention of the New Jersey Attorney General who ignored him. The Respondents continuously refused to turn over the documents in Petitioner's personnel file in violation of Rule 34(a) and C.47:1A-1 of New Jersey State Law for over two years.

4. On July 8, 2004, a complaint was filed in Federal District Court in Newark referenced *04-122-cv-KSH* against the School District citing Age and Civil Rights discrimination. On July 29, 2005, the complaint was dismissed on a Summary Judgment motion. The order stated that the high school could hire a "trainee" instead of the certified Petitioner, while simultaneously admitting that the Respondents produced no proof that the hired individual was even in a training program. In fact, she was not. An appeal was timely filed referenced

05-3922. On March 17, 2006, the Petitioner filed a motion to allow additional information into evidence under Rule 10(e) for a rehearing. The new evidence, now acquired from the NJDCR, albeit late, would have shown that not only was an individual with no qualifications to be in a classroom on her own hired instead of this Petitioner, but also that Petitioner had been lied to by the NJDCR. Rule 10(e) allows additional documentation to be introduced when *"Anything material to either party is omitted from or misstated in the record by error or accident."* Mount Olive High School representative Martha Hatch had lied to both the Federal District Court and the Division of Civil Rights by falsely claiming that she hired a qualified teacher. Despite the above rule, the request to admit documentation demonstrating that Ms. Hatch had lied was denied. On June 2, 2006, The Third Circuit Court of Appeals through Judges Fisher, Aldisert, and Weis affirmed the decision of the District Court that an unlicensed individual could be hired instead of a certified teacher, such as this Petitioner, falsely stating: *"However, he did not produce evidence of the other candidates supposedly inferior qualifications."* All of the Petitioner's qualifications were supplied to the Courts. No qualifications were supplied for the hired twenty-four year old individual because she had none.

5. In addition to being in conflict with Federal and State Education Hiring Laws, the decision of June 2, 2006, is in conflict with and ignores the Supreme Court Decision of March 30, 2005, in *Smith et al vs. City of Jackson*, referenced *03-1160*, in which the Court wrote: ***"The mere policies of an institution which disproportionately harm individuals is sufficient for discrimination."*** In addition to hiring a

young, unlicensed twenty-four (24) year old individual named Elizabeth Ditchek, the high school had engaged in other illegal hirings at that point in time. It offered employment as a Mathematics teacher to another unlicensed, twenty-four year (24) old, Kelly Lawrence, and it hired thirty (30) year old, unlicensed Joe Phealin, while looking askance at the older, licensed Petitioner. This same high school had previously made State and National headlines when it hired a Principal whose only qualifications was a few months in a Bible school. This reflected the policy put in place by the Mount Olive Board of Education which harms older, licensed teachers who have superior teaching credentials and experience. On July 27, 2006, the Petitioner filed a motion for a hearing en banc with a mountain of evidence at his disposal. His motion was denied.

6. On February 3, 2006, under pressure from elected officials, the NJDCR released all of the documents on file from *EP27AE-48689.* The New Jersey Division of Education was never contacted as falsely alleged by The New Jersey Division of Civil Rights. Instead, an interview was conducted with the Morris County Superintendent of Schools, Respondent Rene Rovtar. The documented evidence demonstrated that Rovtar was illegally issuing substitute licenses to individuals with no qualifications to teach at Mount Olive High School, while certified teachers were available. Additionally, she endorsed the permanent hiring of Elizabeth Ditchek who had no qualifications to be in a classroom on her own instead of this Petitioner. On September 17, 2003 Respondent Rovtar wrote: *"Cp. does not have a grievance because he is certified and Ms. Ditchek is going for her certification. They*

can hire either one. The law does not state that they have to hire the certified candidate." See Appendix 1. On September 29, 2005, Respondent Rovtar contradicts herself when she advised the Butler School System where she now works that *". . . New Jersey has always required a teaching certificate/license for all teachers.*" See Appendix 2.

The No Child Left Behind Act mandates that all public schools, which accept Federal Funds, must hire certified teachers. New Jersey's Education Laws are not measurably different and **strictly forbid** the hiring of unlicensed individuals when qualified teachers are available. New Jersey(s) Education Law 6A:9-6.3(b) reads as follows:

> *"A district board of education may apply to the county superintendent for an emergency certificate for a candidate in authorized educational services areas if it can demonstrate its inability to locate a suitable certified candidate due to unforeseen shortages or other extenuating circumstances. The county superintendent may approve the application if he/she determines that there are no suitable candidates to fill the position."*

New Jersey(s) Education Law 6A:9-6.5(a) reads in part: "*The county superintendent may issue county substitute credentials only when the supply of properly certified teachers is inadequate to staff the school.*"

New Jersey(s) Education Law 6A:9-6.5(b) reads:

"The holder of the county substitute credential pursuant to this subsection may serve for no more than 20 consecutive days in the same position in one school district during the school year."

7. On April 5, 2006, a complaint referenced *2:06-cv-0554(JAG)* was filed against the Respondents in Federal District Court for the District of New Jersey. On December 20, 2006, The District Court denied Petitioner's motion to file an amended complaint. Despite the hypocrisy, contradictions, and admissions of Respondent Rovtar referenced above, coupled with the pristine violations of law contained therein, the case was dismissed on a Summary Judgment motion on December 21, 2006, citing both the previous decision in *04-122-cv-KSH* and a plethora of cases not comparable with the instant one. An appeal, referenced *07-1058*, was filed on April 30, 2007. The New Jersey Attorney General's office, with eloquent duplicity, opposed the appeal effectively asking the Third Circuit Court of Appeals to ignore New Jersey's own teacher hiring laws, as well as Federal laws. The Third Circuit Court of Appeals, through Judges Fisher, Aldisert, and Weis, obliged for the second time and endorsed the illegal hiring of an individual, not qualified to be in a classroom on her own, as a high school mathematics teacher instead of this certified Petitioner.

8. The real issues should not be obfuscated in this case. A twenty-four (24) year old individual with no qualifications to be in a classroom on her own was hired to teach in a public high school which accepts Federal and State Funds instead of the sixty (60) year old certified Petitioner. See Appendix 3. State and Federal Education Laws were clearly violated, as well as the ADEA. The Court of Appeals endorsed these illegal actions. The question which the Supreme Court should address is whether or not State and Federal Education Hiring Laws for teachers should be maintained and protected, as well

as the ADEA. The Federal District Court and the Third Circuit Court of Appeals feel that licensing for Mathematics teachers is irrelevant and individuals, not qualified to be in a classroom on their own, should be hired instead of sixty-year old, qualified teachers with proven records.

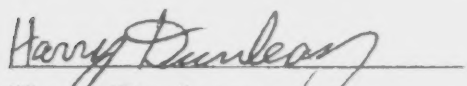
9. New Jersey's Education Hiring Laws for teachers in public schools are not ambiguous. Neither are Federal Education Laws, such as the No Child Left Behind Act (NCLBA). Both require teachers to be certified. Witness again the statement of Respondent Rovtar quoted above: *". . . New Jersey has always required a teaching certificate/license for all teachers."*

10. A Court should not be burdened with a myriad of documents obfuscating the real issues. All of the Petitioner's qualifications were supplied to the Courts. No qualification was supplied by the hired twenty-four (24) year old because she had none. The Petitioner surpassed the burden of proof set down by the Third Circuit Court of Appeals for age discrimination in *McDonnell Douglas Corp. V. Green, 411 U.S. 792 (1973)* and the lesser requirement of the U.S. Supreme Court in *Smith et al vs. City of Jackson*, referenced *03-1160, 2005*. He was a certified teacher in Mathematics with excellent teaching evaluations at both high school and college level. The Respondents looked askance at him and pursued unqualified, younger individuals, finally settling on twenty-four (24) year old Elizabeth Ditchek, who had no license and no training to be in a classroom on her own, or to teach in New Jersey. It is not the duty of the Federal Courts to protect Respondents who violate Federal and State Education Hiring Laws or the ADEA.

All of the Respondents are State actors as defined in § 1983 of the Civil Rights Act. While the most blatant offenders are unquestionably Respondents Rovtar and Watson, the others played their part, either by actions or inactions, and should be found guilty.

WHEREFORE, the Petitioner requests this honorable Court to issue a Writ of Certiorari ordering that the No Child Left Behind Act (NCLBA), mandating that public schools accepting Federal Funds must hire certified teachers, be honored; ordering that New Jersey's Education Laws, mandating that public schools must hire certified teachers, be honored; declaring that the Age Discrimination in Employment Act (ADEA) be honored; declaring that § 1983 of the Civil Rights act be honored, declaring that the Respondents have deliberately engaged in conduct exterior to the law by hiring young individuals, not qualified to be in a classroom, while discriminating against older, certified teachers with excellent records; and awarding the Petitioner lost wages, benefits, and punitive damages in the amount of one million dollars ($1,000,000.00).

Respectfully submitted, January 4, 2008



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APPENDICES

Appendix 1 - September 17, 2003 letter from Susan Paletta

Appendix 2 - September 29, 2005, letter from Rovtar to parents

Appendix 3 - October 6, 2002, letter from Ditchek

Appendix 4 - Order in Case 06-cv-0554(JAG)

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Appendix 1 - September 17, 2003 letter from Susan Paletta

MEMO

TO: FILE
FROM: SUE PALETTA s/Sue Paletta
RE: HARRY DUNLEAVY V. MT. OLIVE HIGH SCHOOL
DOCKET NO. E-48689
DATE: SEPTEMBER 7, 2003

On the above Morris County Superintendent of Schools, Dr. Renee Rovtar, 973-285-8320, called regarding Rps. provisional appointment of the successful candidate, Elizabeth Ditchek. Dr. Rovtar stated that according to NJ rules and regulations, Rp. was correct in its appointment of Ms. Ditchek. Dr. Dovtar stated that Rp. has the option and right to hire either one. Cp. does not have a grievance because he is certified and Ms. Ditchek is going for her certification. They can hire either one. The law does not state that they have to hire the certified candidate.

Appendix 2 - September 29, 2005, letter from Rovtar to parents

BUTLER SCHOOL DISTRICT
Bartholdi Avenue
Butler, New Jersey 07405
(973) 492-2032 Phone (973) 492-1016 Fax
René T. Rovtar, Ed.D.
Superintendent of Schools
Rrovtar@butlerboe.org

September 29, 2005

Dear Parent/Guardian:

The Elementary and Secondary Education Act was our country's most important education law. In 2001 this law was revised and is now called the No Child Left Behind Act. No Child Left Behind (NCLB) was designed to make changes in teaching and learning that will help our students achieve more in school.

The law requires that all schools receiving federal funds must inform parents of their right to ask schools about the qualifications of their child's teachers. Our district receives federal funding and we are happy to share this information with you.

We believe that nothing is more important to your child's education at school than having a well-prepared and highly qualified teacher. The law requires that all teachers meet a specific legal definition of "highly qualified" in order to teach in the schools that receive federal funding. The legal definition of a Highly Qualified Teacher has three parts. It states that the teacher must have the following:

1. A four-year college degree;

2. A regular teaching certificate/license; and

3. Proof of their knowledge in the subject they teach.

New Jersey has some of the most qualified teachers in the country, and we are extremely proud of the quality of the teaching staff in the Butler School District. All of our regular teachers have college degrees and many have advanced degrees. The state of New Jersey has always required a teaching certificate/license for all teachers. In addition, every teacher continues his or her own learning through professional development activities. Our teachers are evaluated each year to make sure that their teaching skills remain at the highest possible level.

A highly qualified teacher knows what to teach, how to teach and has a full understanding of the subject matter being taught. We believe that every teacher in our school district is fully qualified and dedicated to teaching your child.

I encourage you to support your child's education and communicate with his or her teacher on a regular basis. By partnering together - families and educators - we can provide your children with the best education possible.

Sincerely,

René T. Rovtar, Ed.D.
Superintendent

Appendix 3 – October 6, 2002, letter from Ditchek

Elizabeth A. Ditchek
438 Bloomfield Ave
Montclair, NJ 07042
October 6, 2002
Anthony Gonnella, Interm Supt
Mt. Olive Township Board of Ed
89 Route 46
Budd Lake, NJ 07828

Re: Math Teacher Position
To Whom It May Concern,

I am writing you in hopes of securing an interview at your school. I am currently working part-time as a tutor for the Huntington Learning Center, in addition, I hold a full-time analyst position at a consulting firm.

I am currently working toward a Certificate of Eligibility in both Elementary Education and Mathematics. I believe that my previous tutoring, mentoring and training experiences are very applicable to the classroom. I am very eager to work within education and hope that your school may support my desire to teach. I can be contacted at 973.819.9122 or ead511@earthlink.net. I look forward to hearing from you soon!

Thank you very much for your time and consideration.

Respectfully,

s/Elizabeth A. Ditchek

Appendix 4 · Order in Case 06·cv·0554(JAG)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HARRY DUNLEAVY,
Plaintiff,

v.

THE STATE OF NEW JERSEY; THE NEW JERSEY DIVISION OF CIVIL RIGHTS; and individually against, RENE ROVTAR; LORRAINE WATSON; SUSAN PALETTA, and J. FRANK VESPA· PAPELEO,
Defendants.

Civil Action No.06 cv·0554 (JAG)

ORDER

CLOSED

GREENAWAY, JR., U.S.D.J.

This matter comes before the Court on the motions of defendants the State of New Jersey, New Jersey Division of Civil Rights, Rene Rovtar, Lorraine Watson, Susan Paletta, and Frank Vespa· Papaleo, (collectively, the "Defendants") to dismiss the Complaint, pursuant to FED. R. Civ. P. 12(b)(6); and this Court having reviewed the parties' submissions, and for the reasons set forth in the accompanying Opinion, and good cause appearing,

IT IS on this 20th day of December, 2006,

ORDERED that the Plaintiff's motion to amend his Complaint (Docket Entry No. 9) is DENIED; and it is further

ORDERED that the Defendants' motion to dismiss (Docket Entry No. 6) is GRANTED; and it is further

ORDERED that the Complaint (Docket Entry No. 1) is hereby DISMISSED without prejudice; and it is further

ORDERED that a copy of this Order be served on the parties within seven (7) days of the entry of this Order.

S/Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR., U.S.D.J.

Appendix 5 · Opinion in Case 06-cv-0554(JAG)

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HARRY DUNLEAVY,
Plaintiff,

Civil Action No.06
cv-0554 (JAG)

v.

OPINION

THE STATE OF NEW JERSEY;
THE NEW JERSEY DIVISION
OF CIVIL RIGHTS; and
individually against, RENE
ROVTAR; LORRAINE WATSON;
SUSAN PALETTA, and J. FRANK
VESPA- PAPELEO,
Defendants.

GREENAWAY, JR., U.S.D.J.

This matter comes before this Court on the motion of defendants, the State of New Jersey ("State"), New Jersey Division of Civil Rights ("NJDCR") located in Paterson, New, Jersey (Compl. ¶ 3), Rene Rovtar[1] ("Rovtar"), Lorraine Watson[2]

[1] Rene Rovtar was the Superintendent of Education for Morris County, New Jersey, when this action commenced. (Compi. ¶ 3.)

[2] Lorraine Watson was the head of the NJDCR. (Compl. ¶ 3.)

("Watson"), Susan Paletta[3] ("Paletta"), and J. Frank Vespa-Papaleo[4] ("Vespa-Papaleo"), (collectively, "Defendants"), to dismiss the complaint of pro se plaintiff, Harry Dunleavy ("Dunleavy" or "Plaintiff"), pursuant to FED. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted. For the reasons set forth below, this Court will grant Defendants' motion and dismiss the Plaintiff's complaint.[5]

BACKGROUND

In his pro se complaint, Dunleavy alleges that, in 2002, he applied for a high school teaching position with the Mount Olive Board of Education ("Mount Olive"). (Compl. ¶ 5.) However, Mount Olive did not hire Dunleavy for the position and subsequently filled the position with an individual Dunleavy alleges was younger and less experienced. (Id.) Dunleavy alleges he was over sixty years of age when he applied for the teaching position and that he was not hired because of his age. (Compl. ¶ 5, 6.)

After he was denied employment with Mount Olive, Dunleavy filed a complaint with the NJDCR, which ultimately was dismissed. (Compl. ¶ 5.) Subsequent to the dismissal of his complaint, Dunleavy requested information regarding the disposition of the complaint from the NJDCR on November 25, 2003, December 9, 2003 and

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[3] Susan Paletta was an investigator for NJDCR when this suit commenced. (Compl. ¶ 3.)

[4] J. Frank Vespa-Papaleo ("Vespa-Papaleo") was the Director of NJDCR. (Compl. ¶ 3.)

[5] Plaintiff also brings two state law claims, alleging violation of New Jersey laws, N.J. STAT. ANN. §§ 6A:9-6.5(a), 6A:9-6.3(b). This Court shall decline to exercise supplemental jurisdiction and dismiss these claims without prejudice.

November 15, 2005; these requests allegedly were ignored by the NJDCR. (Id.) Dunleavy alleges that he finally received the requested information on December 14, 2005. (Id.) Plaintiff brings the current action[6] against all defendants, alleging violations of the Civil Rights Act, 42 U.S.C. § 1981;[7] Civil Rights Act of 1991,[8] 42 U.S.C. § 2000(c); 42 U.S.C. § 1983;

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[6] Previously, Dunleavy filed a complaint in the United States District Court, District of New .Jersey, against Mount Olive, along with other defendants, alleging violations of the New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-I and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 for being denied employment. Dunleavy v. Mt. Olive Twp. Bd. Of Educ., 2005 U.S. Dist. LEXIS 16040 (D.N.J. 2005). The court in that case granted summary judgment. Id. Since the parties in Dunleavy's current suit are not the same as, or parties in privity to, the parties in his prior case, see EEOC v. U.S. Steel Corp., 921 F.2d 489, 493 (3d Cir. 1990); Swineford v. Snyder County Pa., 15 F.3d 1258, 1267 (3d Cir. 1994), this Court will analyze his claim under the threshold requirements prescribed by the plain language of the ADEA statute, which Dunleavy has failed to satisfy.

[7] This Court liberally interprets Plaintiffs p se complaint to include a Civil Rights claim brought under 42 U.S.C. § 1981. See Zilich v. Lucht, 981 F.2d 694, 694 (3d Cir. 1992) ("When. . . the plaintiff is a pro se litigant, [the court has] a special obligation to construe his complaint liberally."). Plaintiff, in his complaint, states that federal jurisdiction is "based on The Civil Rights Act, 42 U.S.C. Section 1983." (Compl. ¶ 2.) Dunleavy appears to cite 42 U.S.C. § 1983 to support his Civil Rights claim, although this statute is not part of the Civil Rights Act. Therefore, this Court will analyze the civil rights claim and § 1983 claim as separate claims.

[8] Dunleavy's complaint specifically cites a claim under the Civil Rights Act of 1991 and, as previously noted, also makes a general reference to the "Civil Rights Act." (Compl. ¶ 2.) This Court liberally interprets Dunleavy's complaint by analyzing the general "Civil Rights" claim as a separate 42 U.S.C. § 1981 claim, in addition to the Civil Rights Act of 1991 claim.

No Child Left Behind Act ("NCLBA"), 20 U.S.C. § 6301; Freedom of Information Act ("FOIA"), 5 U.S.C. § 552; Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621;[9] and the New Jersey school laws, N.J. STAT. ANN. §S 6A:9-6.5(a), 6A:9-6.3(b). (Compl. ¶ 2.) Plaintiff brings eight claims in total. Six of the claims are brought under federal statutes, creating federal question jurisdiction. The remaining two claims relate to state claims.

All defendants collectively[10] move to dismiss all counts brought against them based upon their theory that Dunleavy has not set forth sufficient information to establish his claims. (Br. in Support of Notice of Mot. to Dismiss Pursuant to FED. R. Civ. P. 12(b)(6) at 2.)

This Court concludes that Plaintiff failed to state a claim pursuant to any of the federal statutes he cites, so these claims will be dismissed. This Court will not exercise supplemental jurisdiction over the remaining state law claims.

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[9] Dunleavy, in his complaint, states two separate age discrimination claims under the Age Discrimination in Employment Act of 1967 and "Title 29, Chapter 14, Section 623(1)." (Compl. ¶ 2.) The ADEA is the general reference to the complete age discrimination statute and its corresponding subsections. Section 623 is a subsection of the ADEA which prohibits the type of unlawful employment discrimination Dunleavy claims Defendants practiced. Thus, this Court will treat Dunleavy's age discrimination claims as a singular claim and analyze the claim pursuant to 29 U.S.C. § 623(1).

[10] Defendants bring separate motions to dismiss. However, their arguments were included in a single brief. (Br. in Support of Notice of Mot. to Dismiss Pursuant to FED. R. Civ. P. 12(b)(6).)

DISCUSSION

A. Standard of Review Pursuant to FED. R. Civ. P. 12(b)(6)

On a motion to dismiss for failure to state a claim, pursuant to FED. R. Civ. P. 12(b)(6), the court is required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and to view them in the light most favorable to the non-moving party. See Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994). A complaint should be dismissed only if the alleged facts, taken as true, fail to state a claim. See In re Warfarin Sodium, 214 F.3d 395, 397-98 (3d Cir. 2000). The question is whether the claimant can prove any set of facts consistent with his or her allegations that will entitle him or her to relief, not whether that person will ultimately prevail. Scheuer v. Rhodes, 416 U.S. 232, 236 (1974); Semerenko v. Cendant Corp., 223 F.3d 165, 173 (3d Cir. 2000). While a court will accept well-pled allegations as true for the purposes of the motion, it will not accept bald assertions, unsupported conclusions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. Morse v. Lower Merion School District, 132 F.3d 902, 906 (3d Cir. 1997). "The pleader is required to 'set forth sufficient information to outline the elements of his claim or to permit inferences to be drawn that these elements exist.'" Kost v. Kozakewicz, 1 F.3d 176, 183 (3d Cir. 1993) (quoting 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 340 (2d ed. 1990)).

The court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint, and matters of public record. See Pittsburgh v. W. Penn Power Co., 147 F.3d 256, 259 (3d Cir. 1998); 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357 (2d ed. 1990). "Plaintiffs cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them." In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1426 (3d Cir. 1997). "[A] 'document integral to or explicitly relied upon in the complaint' may be considered 'without converting the motion [to dismiss] into one for summary judgment.'" Id. (emphasis in original) (quoting Shaw v Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996)). Any further expansion beyond the pleadings, however, may require conversion of the motion into one for summary judgment. FED. R. Civ. P. 12(b).

B. Civil Rights Claims

1. Standard of Review Pursuant to 42 U.S.C. § 2000(e) and §1981

The Civil Rights Act of 1991 ("Civil Rights Act") was enacted to provide, among other things, remedies under federal law to deter against discrimination in employment. See Pub. L. No. 102-166, 105 Stat. 1071 (1991). This Act represents an amendment to the Civil Rights Act of 1964 (also known as Title VII), which was enacted to, among other things, enforce the constitutional right to vote, provide injunctive relief against discrimination in public accommodations, and protect constitutional

rights in public facilities and public education. Sec Pub. L No. 88-352, 78 Stat. 241 (1964).

The Civil Rights Acts of 1991 and 1964,[11] to act as deterrents for discrimination, make it an unlawful employment practice to discriminate on the basis of "race, color, religion, sex or national origin" 42 U.S.C. § 2000(e)-2. This statute states, in part, that it shall be an unlawful employment practice for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

In addition to the Civil Rights Acts, 42 U.S.C. § 1981 was enacted to provide protection against racial discrimination. Section 1981 prohibits racial discrimination in the making of private and public contracts. 42 U.S.C. § 1981; Pamintuan v. Nanticoke

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[11] The Civil Rights Act of 1991 is not a new, independent statute but rather an amendment to the Civil Rights Act of 1964. To state a claim under the Civil Rights Act of 1991, a plaintiff must meet the same basic elements of race, color, religion, sex or national origin and, in this aspect only, the statutes will be discussed and analyzed interchangeably. See 42 U.S.C. § 2000(e).

Mem'l Hosp., 192 F.3c1 378, 386 (3d Cir. 1999). Section 1981 states, in part, that:

> [a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

In order to establish a prima facie case under the Civil Rights Acts or § 1981, the plaintiff must show that "he is a member of a protected class, was qualified for the employment position, and was not selected for that position 'under the circumstances that give rise to an inference of unlawful discrimination.'"[12] Hampton v. Borough of Tinton Falls Police Dept., 98 F.3d 107, 122 (3d Cir. 1996) (quoting Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)).

2. Analysis for Civil Rights Claim, 42 U.S.C. § 2000(e)

In order to satisfy the first prong of a prima facie claim under § 2000(e), Plaintiff must show that he is a member of a protected class. Hampton, 98 F.3d at 122, The Civil Rights Act establishes five protected

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[12] Claims brought under Title Vii and § 1981 are analyzed under the same legal framework. Pamintuan v. Nanticoke Mem'l Hosp., 192 F.3d 378, 385 (3d Cir. 1999) ("We analyze section 1981 claims under the familiar McDonnell Douglas shifting burden framework used in Title VII discrimination cases.").

classes: race, color, religion, sex and national origin. 42 U.S.C. § 2000(e); Storey v. Burns Int'l Sec. Serv., 390 R.3d 760, 764 (3d Cir. 2004). To qualify as a member of a protected class, under the definition of the Civil Rights Act, Dunleavy must be a member of one of the five categories identified in the text of the statute. Sarullo v. U.S. Postal Serv., 352 F.3d 789, 798 (3d Cir. 2003).

In the present case, Dunleavy makes no allegations regarding his race, color, religion, sex or national origin. Rather, he claims he was not offered the teaching position at Mount Olive because of his age.[13] (Compl. ¶ 6.) Age is not one of the five protected classes under § 2000(e). Since Plaintiff fails to state a cause of action recognized by the Civil Rights Act, this claim shall be dismissed.

3. **Analysis of 42 U.S.C. § 1981 Claim**

Plaintiff must show that he is a member of a protected class in order to satisfy the first prong of a prima facie claim under § 1981 of the Civil Rights Act. Hampton, 98 F.3d at 122. Section 1981 prohibits racial discrimination in the making of private and public contracts. Therefore, the threshold requirement of a claim brought under this section is discrimination based upon race of the plaintiff. See Al-Khazraji v. St. Francis College, 784 F.2d 505, 514-515 (3d Cir. 1986).

In the present case, Dunleavy claims that he was discriminated against and not hired for the teaching position due to his age. (Compl. ¶ 6.) He does not

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[13] Plaintiff alleges that he was over the age of sixty at the time of his application for employment at Mount Olive. He also alleges the position was subsequently filled by a much younger candidate. (Compl. ¶ 5.)

allege any cause of action pertaining to racial discrimination. Age is not provided protection under § 1981. As a result, Plaintiff fails to state a cause of action recognized by this statute, so this claim shall be dismissed.

C. 20 U.S.C. 6301 Claim

1. Standard of Review Pursuant to 20 U.S.C. § 6301

The No Child Left Behind Act ("NCLBA"), 20 U.S.C. § 6301, is a comprehensive education reform statute directed at the states. 20 U.S.C. §§ 6301(1)-(12). The purpose of the NCLBA is to "ensure that all children have a fair, equal and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301.

In order to accomplish the NCLBA's objective, the statute charges state and local agencies with the hiring, retention and continued professional development of "qualified" teachers. 20 U.S.C. § 6319(a)(l)("[E]ach local educational agency receiving assistance under this part [20 U.S.C. §§ et seq.) shall ensure that all teachers hired after such day and teaching in a program supported with funds under this part are highly qualified."); 20 U.S.C. § 6601(1) ("The purpose of this part [20 U.S.C. §§ et seq.) is to. . . increase student academic achievement through strategies such as improving teacher and principal quality and increasing the number of highly qualified teachers in the classroom.") In addition. the local and state agencies are responsible for developing a plan to ensure that all teachers teaching within the state and corresponding school districts are "qualified" and must annually report

their progress to the Secretary of the Department of Education. 20 U.S.C. § 6319.

The remedy to any state's noncompliance with the NCLBA lies with the Secretary of Education. 20 U.S.C. § 6311 (g)(2). The only remedy available under the NCLBA for noncompliance allows the Secretary of Education to withhold "funds for State administration under this part until the Secretary determines that the State has fulfilled those requirements." Id. The NCLBA does not provide any remedy for parents, students, or any other individuals to enforce a state's alleged noncompliance. See id.

In order for an individual to bring a claim under a federal statute, the statute must confer a private right of action. See Alexander v. Ala. Dep't of Pub. Safety, 532 U.S. 275, 286 (2001) ("Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress.") The court must perform an initial inquiry to determine whether or not a statute "confers rights on a particular class of persons." Gonzaga Univ. v. Doe, 536 U.S. 273, 285 (2002). Where a statute is phrased in such explicit rights-creating terms, "the judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Alexander, 532 U.S. at 286. However, no basis for private enforcement exists without Congressional manifestation of "unambiguous intent to confer individual rights." Gonzaga, 536 U.S. at 286.

2. Analysis for 20 U.S.C. § 6301 claim

In the present case, Plaintiff seeks to bring a claim under the NCLBA, 20 U.S.C. § 6301. Dunleavy

claims Defendants violated the NCLBA's requirement that public schools hire qualified teachers. (Compl. ¶ 6.) The NCLBA was enacted to "ensure that all children have a fair, equal and significant opportunity to obtain a high quality education and reach, at a minimum, proficiency on challenging State academic achievement standards and state academic assessments." 20 U.S.C. § 6301. To accomplish this objective, a relevant part of the NCLBA contains language that requires the procurement, retention, and development of "qualified" teachers. See 20 U.S.C. § 6319, 6601.

In order to determine if Dunleavy can bring a claim under the NCLBA, this Court must analyze the NCLBA's language to determine whether Congress manifested "unambiguous intent to confer individual rights" to enforce an alleged violation of 20 U.S.C. § 6301. Gonzaga, 536 U.S. at 286. The nature of the enforcement mechanisms available under the NCLBA suggests that Congressional intent to create a private right of action is not present. The NCBLA vests enforcement authority in the United States Secretary of Education ("Secretary"). Id. Section 6311 (g)(2) permits the Secretary to withhold state administrative funds from states that fail to meet the requirements of the NCLBA. Id. None of the NCLBA's provisions provide remedies to parents, teachers, students or any other individuals or organizations when state schools allegedly violate the NCLBA. Id. Nothing in the NCLBA indicates the Congress intended to create individual rights that Dunleavy may enforce in a court of law. This Court concludes that the NCLBA does not create a private right of action, and

therefore Plaintiff cannot state a claim pursuant to the NCLBA. Thus, his claim must be dismissed.

D. 5 U.S.C. 522 Claim

1. Standard of Review Pursuant to 5 U.S.C. § 522

The Freedom of Information Act ("FOIA") permits an individual to see any federal government record, document, or publication, provided it is not covered by one of nine possible exceptions.[14] 5 U.S.C. § 552. FOIA requires that each "agency" make this information available to the public. Id. "Agency," as defined in 5 U.S.C. § 551(1), means "each authority of the Government of the United States." 5 U.S.C. § 551(1). The district court for the District of New Jersey has stated that the term "agency," in reference to FOIA, applies strictly to federal agencies and does not extend to state or local agencies. Krebs

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[14] The nine exceptions, as identified under the Freedom of Information Act, are, in part: "(1) matters that are specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy... ; (2) related solely to the internal personnel rules and practices of an agency; (3) specifically exempted from disclosure by statute . . . ; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential; (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency; (6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; (7) records or information compiled for law enforcement purposes; (8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or (9) geological or geophysical information, data, including maps, concerning wells." 5 U.S.C. § 552(b)(1)-(9).

v. Rutgers, the State University of New Jersey, 797 F. Supp. 1246, 1253 (D.N.J. 1992). Thus, a plaintiff bringing a claim under FOLA would have to meet a minimum threshold that the defendant be a federal agency.

2. Analysis for 5 U.S.C. § 522 Claim

A threshold requirement for bringing a claim under 5 U.S.C. § 552 is that the defendants are a federal agency, since only federal agencies are required to comply with this statute. Krebs, 797 F. Supp. at 1253 (the term "agency," as defined by FOIA, applies strictly to federal agencies). In the present case, Plaintiff claims Defendants violated FOIA by allegedly ignoring his requests made to the NJDCR for information.[15] The NJDCR is a New Jersey state agency, not a federal agency. Only federal agencies are required to abide by FOIA, so the NJDCR cannot violate FOIA. As a result, Plaintiff has failed to state a claim for which relief can be granted and thus, Defendants' motion to dismiss will be granted.

E. 29 U.S.C. § 621 Claim

1. Standard of Review Pursuant to 29 U.S.C. § 621

The "ADEA prohibits discrimination by employers on the basis of age." 29 U.S.C. § 623(a)(1). The ADEA, in part, makes it unlawful for an employer:

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[15] Plaintiff claims he requested information from the New Jersey Division of Civil Rights on November 25, 2003, December 9, 2003, and November 15, 2005, but did not receive this information until December 14, 2005, and only through intervention of State Senator Robert Littell and Assemblywoman Allison McHose. (Compl. ¶ 5.)

> (1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this Act.

In order to establish a prima facie case of age discrimination under the ADEA, plaintiff must "demonstrate that (1) he was over forty years old at the time he was discharged; (2) he was qualified for the position from which he was discharged and performing same in a satisfactory manner; (3) his employment was discharged despite his qualifications and performance; and (4) his employer ultimately filled the position with a person sufficiently younger to permit an inference of age discrimination." Acevedo v. High, 420 F. Supp.2d 337, 341 (D.N.J. 2006).

2. Analysis for 29 U.S.C. § 621 Claim

Before being able to consider the four factors required to establish a prima facie case under the ADEA, Plaintiff must satisfy a threshold criterion, which is provided by the statutory language of the Act. As stated before, the ADEA prohibits discrimination by employers on the basis of age. 29 U.S.C. § 623(a)(1); O'Connor v. Consol. Coin Caterers

Corp., 517 U.S. 308, 311-312 (1996). The basic language of the statute requires, and provides protection from, discriminatory employer action. See White v. Camden City Bd. Of Ed., 251 F. Supp. 2d 1242, 1246 (D.N.J. 2003). An employer, as defined by the ADEA, is a "person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current preceding year." 29 U.S.C. § 630(b).

In the present case, Dunleavy brings an ADEA claim against all defendants. However, defendants Rovtar, Watson, Paletta, and Vespa-Papaleo are employees of the state. As employees of the state, these defendants do not meet the definition of employer, as defined by the ADEA and thus, their motions to dismiss Plaintiffs ADEA claim will be granted.

Defendants State of New Jersey and the NJDCR require closer review by this Court to determine if they are employers, as defined by the ADEA. Even assuming for the sake of argument that these two defendants could satisfy the definition of an employer, Plaintiff has not alleged that either of these defendants were his employers or that he even attempted to gain employment with these entities. Plaintiff alleges his application for employment was submitted to Mount Olive School District and not the state of New Jersey or the NJDCR. Therefore, these entities cannot be construed as Dunleavy's employers, as defined by the ADEA. Defendants' motion to dismiss will be granted due to Plaintiff's failure to state a claim, pursuant to the ADEA.

F. 42 U.S.C. 1983 Claim

1. Standard of Review Pursuant to 42 U.S.C. § 1983

Section 1983 of Title 42 of the United States Code authorizes a person to seek redress for a violation of his federal rights by a person who was acting under color of state law. Section 1983 provides in relevant part that:

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . . subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the other party injured in action at law, suit in equity, or other proper proceeding for redress.

Therefore, to establish a violation of 42 U.S.C. § 983, a plaintiff must demonstrate: (1) that he or she was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the challenged conduct was committed by a person acting under color of state law. See West v. Atkins. 487 U.S. 42,48 (1988); Adickes v. S.J. Kress & Co., 398 U.S. 144, 152 (1970); Sample v. Diecks, 885 F.2d 1099, 1107 (3d Cir. 1989). That is, "[w]hen evaluating a claim brought under § 1983, [the court] must first 'identify the exact contours of the underlying right said to have been violated' in order to determine 'whether [plaintiff] has alleged a deprivation of a constitutional right at all." Natale v. Camden

County Correctional Facility, 318 F.3d 575, 581 (3d Cir. 2003) (quoting Nicini v. Morra, 212 F.3d 798, 806 (3d Cir. 2000)).

2. Analysis for 42 U.S.C. § 1983 claim

Dunleavy must demonstrate that: (1) that he was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States; and (2) that the challenged conduct was committed by a person acting under color of state law, in order to establish a claim under 42 U.S.C. § 1983. See West, 487 U.S. at 48; Adickes, 398 U.S. at 52; Sample, 885 F.2d at 1107.

In the present case, Plaintiff's claim is grounded in the fact that he was not hired for a teaching position at Mount Olive. Given that the crux of Plaintiff's argument is employment, he must establish that a property right existed to the position in question. See Gikas v. Wash. Sch. Dist., 328 F.3d 731, 737 (3d Cir. 2003). In order for a property interest in a job or job benefit to exist, "an employee must have a legitimate claim of entitlement to that job, not just a unilateral expectation." Latessa, 113 F.3d at 1318.

Dunleavy applied for a mathematics teaching position at Mount Olive in an effort to obtain employment. This position was neither guaranteed nor secured. Submitting an application for potential employment does not create a legitimate claim of entitlement to a job. Anderson v. Philadelphia, 845 F.2d 1216, 220-1221 (3d Cir. 1988). Dunleavy's § 1983 claim fails because he did not set forth sufficient facts to establish that he had a constitutionally protected property right in this teaching position. In addition, Dunleavy fails to

establish a violation of his rights secured by federal law. Since Plaintiff did not satisfy the first prong of the test, this Court need not address the second prong. Defendants' motion to dismiss Plaintiff's § 1983 claims shall be granted.

C. Motion to Amend Complaint

1. Standard of Review for Leave to Amend

Rule 15(a) provides that a party may amend his pleading once before a responsive pleading is served, or thereafter upon leave of the court or on consent from his adversary. See Fed. R. Civ. P. 15(a). The rule further provides that "leave should be freely given when justice so requires." Id. Leave to amend shall be given freely, in the absence of circumstances such as undue prejudice to the opposing party or futility of amendment. Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). Granting leave to amend is futile if the amended complaint cannot withstand a renewed motion to dismiss. Id.

2. Analysis for Leave to Amend

In the present case, Plaintiff moves to amend his initial complaint. Dunleavy attempts to add the New Jersey Attorney General ("Attorney General") and the New Jersey Department of Education ("Department of Education") as defendants for "illegally violating State and Federal Education laws" by failing to "investigate the situation." (Am. Compl. ¶7.) Dunleavy's references to "Federal Education" laws and investigation of his "situation" are ambiguous. This Court interprets Dunleavy's "Federal Education" law statement to refer to the federal law, the No Child Left Behind Act. The NCLBA does not confer a private right of action,

which must exist in order for Dunleavy to bring a claim pursuant to this Act. The inclusion of the Attorney General and the Department of Education as defendants would not create a private action for Dunleavy under the NCLBA, so this claim would not survive a renewed motion to dismiss.[16]

Dunleavy also references "State Education" laws in his amended complaint. (Am. Compl. ¶7.) Since this Court will dismiss Plaintiff's federal claims that create federal jurisdiction, only Dunleavy's state claims will remain. This Court elects not to exercise supplemental jurisdiction over these state claims.

Dunleavy's amended complaint does not create or maintain federal jurisdiction, so his amended complaint would not withstand a renewed motion to dismiss. Dunleavy's amended complaint is futile because it will not survive a renewed motion to dismiss and thus, his request that leave be granted to amend his complaint shall be denied.

H. Jurisdiction

State law claims

The remaining two substantive claims in the complaint are based on New Jersey state law. Jurisdiction over state law claims is provided by 28 U.S.C. § 1367(a), which states that, with certain exceptions not relevant here, "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related

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[16] The Attorney General of The State of New Jersey would also be able to assert immunity, likely qualified, against Plaintiffs assertion of liability, but this Court need not resolve this issue given the denial of the motion to amend.

to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution."

However, "district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if... (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). The Third Circuit has observed that "[t]he power to exercise pendent jurisdiction, though largely unrestricted, requires, at a minimum, a federal claim of sufficient substance to confer subject matter jurisdiction on the court." Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 196 (3d Cir. 1976) (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966)). Further, in cases where the federal claims are subject to dismissal under FED. R. Civ. P. 12(b)(6), "the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances." Id.

In the present case, all federal claims have been dismissed. Further, Plaintiff has not presented any exceptional circumstances that would remove this case from the general rule requiring dismissal of the state law claims. Specifically, the Third Circuit has observed that "considerations of 'judicial economy, convenience, and fairness to the litigants' dictate that pendent claims be entertained." Id. None of those factors are present here. Thus, this Court declines to exercise supplemental jurisdiction over the remaining state law claims and will dismiss them accordingly.

Conclusion

For the reasons set forth above, Plaintiff fails to state a claim, pursuant to 42 U.S.C. § 2000(c)-2, 42 U.S.C. § 1983, 20 U.S.C. § 6301,5 U.S.C. § 552, 29 U.S.C. § 621, and 29 U.S.C. § 623, for which relief can be granted. As a result, these claims will be dismissed. Further, this Court declines to assert supplemental jurisdiction over the remaining state law claims, which will be dismissed.

Date: December 20, 2006

S/Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR., U.S.D.J.

Appendix 6 - Judgment in Court of Appeals Case 07-1058

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 07-1058

HARRY DUNLEAVY,
Appellant
vs.

THE STATE OF NEW JERSEY;
THE NEW JERSEY DIVISION OF CIVIL RIGHTS;
RENE ROVTAR, individually;
LORRAINE WATSON, individually;
SUSAN PALETTA, individually;
J. FRANK VESPA-PAPALEO, individually;
SANDRA ALON; STEVEN KRAMER; ROSALIE LAMONTE; MONTVTLLE BOARD OF EDUCATION; MONTVILLE TOWNSHIP

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 06-cv-00554)
District Judge: Honorable Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1(a)
October 9, 2007
Before: FISHER, ALDISERT and WEIS,
CIRCUIT JUDGES

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a). On consideration whereof, it is now here

ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered December 21, 2006, be and the same is hereby affirmed. Costs taxed against the Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/Marcia S. Waldron
Clerk

DATED: October 16, 2007
smw/cc: Mr. Harry Dunleavy
Melissa T. Dutton, Esq.

Appendix 7 - Opinion in Court of Appeals Case 07-1058

NOT PRECEDENTIAL
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 07-1058

HARRY DUNLEAVY,
Appellant

vs.

THE STATE OF NEW JERSEY; THE NEW JERSEY DIVISION OF CIVIL RIGHTS; RENE ROVTAR, individually; LORRAINE WATSON, individually; SUSAN PALETTA, individually; J. FRANK VESPA-PAPALEO, individually; SANDRA ALON; STEVEN KRAMER; ROSALIE LAMONTE; MONT VILLE BOARD OF EDUCATION; MONTVILLE TOWNSHIP

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 06-cv-00554)
District Judge: Honorable Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1(a)
October 9, 2007
Before: FISHER, ALDISERT and WEIS,
CIRCUIT JUDGES

Filed: October 16, 2007

OPINION

PER CURIAM.

Harry Dunleavy sued the State of New Jersey, the New Jersey Division of Civil Rights ("NJDCR"), Rene Rovtar (then Superintendent of Education for Morris County, New Jersey), Lorraine Watson (the manager of the NJDCR office in Paterson, New Jersey), Susan Paletta (a NJDCR investigator), and J. Frank Vespa-Papaleo (Director of the NJDCR).[1] Dunleavy purported to proceed under "the Civil Rights Acts, the No Child Left Behind Federal Act, the Age Discrimination Acts, the Freedom of Information Act (FOIA), and the Education Laws of the State of New Jersey." Supp. App. D01. He also cited 42 U.S.C. § 1983 and state law causes of action, including specific provisions of New Jersey statutes. Id. at D01, D05-D07.

As Dunleavy described them in his complaint, the events giving rise to his lawsuit began in 2002, when he applied for a position as a high school Mathematics teacher with the Mount Olive Board of

[1] The caption includes additional names of persons listed on the District Court docket, but those persons were neither named in Dunleavy's complaint nor served as defendants.

Education ("Mount Olive"). Mount Olive allegedly passed him over for employment as a high school Mathematics teacher in favor of less-qualified younger applicants. In response, Dunleavy filed a complaint with the NJDCR. Watson dismissed the charge of discrimination. Dunleavy subsequently cited FOIA to request information from the NJDCR. The NJDCR initially ignored his requests, but then provided him with some information, which led him to believe that Rovtar had colluded with Mount Olive and NJDCR to deem legal Mount Olive's decision not to hire him. Dunleavy also took issue with Rovtar's decision to issue a substitute teaching license to the candidate Mount Olive hired, and with Watson, Paletta, and Vespa-Papaleo's efforts to conceal the alleged illegality of Rovtar's action.

Defendants, as a group, moved to dismiss Dunleavy's complaint. Defendants argued that Dunleavy failed to state a federal claim and that the District Court should decline to exercise supplemental jurisdiction over the state law claims. Defendants also contended that collateral estoppel barred any claim under the Age Discrimination and Employment Act ("ADEA"), that the lack of a private right of action doomed any claim under the No Child Left Behind Act ("NCLBA"), and that the defense of qualified immunity served as alternative basis for rejecting any claims under 42 U.S.C. § 1983. Dunleavy first filed a motion for leave to amend his complaint (attaching a proposed amended complaint to his motion), and then submitted a response to Defendants' motion. After Defendants responded to the former and replied to the latter, the District Court ruled.

The District Court liberally construed Dunleavy's complaint as raising claims under the Civil Rights Acts of 1991 and 1964,42 U.S.C. § 2000e; 42 U.S.C. § 1981; NCLBA, 20 U.S.C. § 6301; FOIA, 5U.S.C. § 552; ADEA, 29 U.S.C. § 621;and 42 U.S.C. § 1983, and held that Dunleavy had failed to state a claim upon which relief can be granted. The District Court declined to exercise supplemental jurisdiction over Dunleavy's state law claims. The District Court also denied Dunleavy's motion for leave to amend his complaint, concluding that amendment was futile. Dunleavy appeals.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We exercise plenary review over a dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. See Lum v. Bank of Am., 361 F.3d 217, 223 (3d Cir. 2004). We review the dismissal of the state law claims pursuant to 28 U.S.C. § 1367(c) and the decision to deny leave to amend for abuse of discretion. Cf. De Asencio v. Tyson Foods, Inc., 342 F.3d 301, 311 (3d Cir. 2003); see Grayson v. Mayview State Hosp., 293 F.3d 103, 106 (3d cir. 2002). We agree with the District Court's characterization of Dunleavy's claims, and we will consider each claim in turn.

First, we agree with the District Court's decision to dismiss Dunleavy's claims under the "Civil Rights Acts." The Civil Rights Act of 1991 makes unlawful a failure or refusal to hire on the basis of race, color, religion, sex, or national origin. See 42 U.S.C. § 2000e-2(a). Dunleavy did not state a claim for an unlawful failure to hire in violation of the Civil Rights Act because he did not allege discrimination on the basis of race, color, religion, sex, or national origin. He claimed discrimination on the basis of age.

Any claim Dunleavy tried to bring under 42 U.S.C. § 1981 was appropriately dismissed for similar reasons. Section 1981 provides a remedy for discrimination on the basis of race, not age. 42 U.S.C. § 1981; Al-Khazrjiv. St. Francis College, 784 F.2d 505, 514-518 (3d Cir. 1986).

We also conclude that the District Court was correct in dismissing Dunleavy's NCLBA claims because he had no private right of action under the statute. Congress must create a private right of action before an individual may bring suit to enforce federal law. See Alexander v. Sandoval, 532 U.S. 275, 286 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Id. Every court that has considered whether the NCLBA evidences the unambiguous, see Gonzaga Univ. v. Doe, 536 U.S. 273, 286 (2002), intent to create a private cause of action has decided it does not. See Alliance for Children, Inc. v. City of Detroit Pub. Schs., 475 F. Supp. 2d 655, 658 (D. Mich. 2007) (collecting cases). Under the sound analysis of the District Court, including its note of the relevant statutory enforcement provisions, we agree that Dunleavy does not have a private cause of action under the NCLBA.

The District Court also properly dismissed Dunleavy's FOIA claims. In establishing "a policy of openness toward information within [the federal government's] control," S. Rep. No. 110-59, at 1 (2007), FOIA obligated federal agencies to make their documents, records, and publications available to the public. See 5 U.S.C. § 552. FOIA does not impose a similar obligation on state agencies such as

NJDCR, the entity Dunleavy charged with ignoring his requests for information. Accordingly, Dunleavy did not state a FOIA claim.

Dunleavy's ADEA cause of action was barred by issue preclusion.[2] Issue preclusion, formerly known as collateral estoppel, is appropriately invoked when "(1) the identical issue was decided in a prior adjudication; (2) there was a final judgment on the merits; (3) the party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and (4) the party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question." Bd. of Trustees v. Centra, 983 F.2d 495, 505 (3d Cir. 1992). Dunleavy's ADEA claim is that he was not hired as a Mathematics teacher by Mount Olive on the basis of his age. However, Dunleavy presented and lost on this same ADEA claim in a prior lawsuit which was decided on the merits after he had a full and fair opportunity to litigate it. See Dunleavy v. Mount Olive Twp., 183 F. App'x 157 (3d Cir. 2006) (per curiam). Accordingly, his ADEA cause of action could not proceed.

To the extent Dunleavy presented a claim under 42 U.S.C. § 1983 (rather than merely citing the statute), his § 1983 action could not proceed, either. Among other infirmities with his pleading, Dunleavy did not allege that he was deprived of a right, privilege, or immunity secured by the Constitution or laws of the United States. 42 U.S.C. § 1983.

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[2] Although the District Court considered different grounds for dismissal of the ADEA claims, we affirm, as we may, on an alternative basis supported by the record. See Erie Telecomm. v. Erie, 853 F.2d 1084, 1089 (3d Cir. 1988).

Although he claimed that he did not get a job, Dunleavy did not have a property right in the teaching position that he sought. Cf. Latessa v. New Jersey Racing Comm'n, 113 F.3d 1313, 1318 (3d Cir. 1997).

Because Dunleavy did not present actionable federal claims, the District Court did not abuse its discretion in declining to exercise jurisdiction over Dunleavy's state law claims. See 28 U.S.C. § 1367(c); De Asencio, 342 F.3d at 309.

We also hold that the District Court did not abuse its discretion in denying Dunleavy's motion for leave to amend his complaint because amendment would have been futile.[3] Leave to amend should be granted until amendment is futile or inequitable. See Grayson, 293 F.3d at 106. Amendment is futile if the amended complaint cannot withstand a renewed motion to dismiss. See Jablonski v. Pan American World Airways, Inc., 863 F.2d 289, 292 (3d Cir. 1988). In his proposed amendment, Dunleavy sought to add the New Jersey Attorney General and the New Jersey Department of Education as defendants. He largely presented the same claims as in his original complaint, but he also added allegations that the newly named Defendants concealed information from him and violated state and federal education laws to his detriment. As the District Court concluded, it appears that Dunleavy is

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[3] Dunleavy could have amended his complaint once as a matter of course before a responsive pleading was served. See Fed. R. Civ. P. 15. Defendants' motion to dismiss was not a responsive pleading. See, e.g. Centifanti v. Nix, 865 F.2d 1422, 1431 n.9 (3d Cir. 1989). However, because Dunleavy filed a motion to amend, we treat this case as one in which leave to amend was required. See at 1431.

complaining of perceived violations of the NCLBA and various state laws. In light of its contents, his amended complaint could not withstand a renewed motion to dismiss, as his original claims and his new NCLBA allegations would not state a claim upon which relief could be granted for the reasons given elsewhere in this opinion, and his state law claims would appropriately be dismissed pursuant to 28 U.S.C. § 1367(c). See Tully v. Mott Supermarkets, Inc., 540 F.2d 187, 195-96 (3d Cir. 1976).

In sum, the District Court acted properly in dismissing Dunleavy's complaint and denying Dunleavy leave to amend. Accordingly, we will affirm the judgment of the District Court.